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April 28, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68

Dear Ms. Salas:

I have enclosed the original and four copies of the Reply Comments of Pac-West Telecomm, Inc. in the above-referenced proceeding. These reply comments were filed through the Commission's Electronic Comment Filing System yesterday evening. The enclosed comments contain two Exhibits that were not filed electronically.

If you have any additional questions regarding these Reply Comments, please do not hesitate to contact me.

Sincerely,

Michael W. Fleming

Michael W. Fleming

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	CC Docket No. 99-68
Inter-Carrier Compensation for ISP-Bound Traffic	)	

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REPLY COMMENTS OF PAC-WEST TELECOMM, INC.

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Dated: April 27, 1999

Counsel for Pac-West Telecomm, Inc.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	CC Docket No. 99-68
Inter-Carrier Compensation for ISP-Bound Traffic	)	

REPLY COMMENTS OF PAC-WEST TELECOMM, INC.

Pac-West Telecomm, Inc. ("Pac-West"), by its undersigned counsel, hereby submits its reply comments pursuant to the Notice of Proposed Rulemaking issued February 26, 1999.[1] These comments will address the alternative compensation systems proposed by the commenting parties. The only compensation proposals that the Commission should consider further are those proposed by competitive local exchange carriers ("CLECs") and the Texas Public Utilities Commission. These reply comments will also update the status of two state proceedings regarding reciprocal compensation issued since the Commission's Declaratory Ruling.

I. THE ONLY COMPENSATION SYSTEMS THAT THE COMMISSION SHOULD CONSIDER FURTHER ARE THOSE SUBMITTED BY CLECS

A number of alternative compensation systems have been proposed by the parties filing comments. The proposals submitted by the ILECs are either logically deficient or fundamentally unfair to the carrier delivering traffic to ISPs. They should be rejected. The proposals submitted by the state commissions have some merit, but implementation could prove to be problematic. The

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in Docket No. 99-68 (rel. Feb. 26, 1999) ("Declaratory Ruling" or "NPRM").

proposals submitted by the CLECs, on the other hand, appear to be the fairest and simplest to administer. These proposals warrant further consideration by the Commission.

A. The ILEC Proposals are Fundamentally Unfair or Logically Deficient

All of the ILECs (with the exception of Frontier Communications, Inc.) propose an inter-carrier compensation plan under which they pay nothing to CLECs for terminating the ILEC's end user's calls. The compensation plans proposed by the ILECs follow the form of either meet-point billing arrangements or revenue sharing. Neither system would adequately compensate the CLEC for the services it provides and the costs it incurs on behalf of the ILEC. Therefore, these ILEC proposals should be rejected.

SBC Communications, Inc. proposes a meet-point billing arrangement in which the LEC serving the ISP receives access compensation from the ISP through a subscriber line charge ("SLC") and intrastate business line rates. SBC Comments at 22. The LEC serving the ISP subscriber would be compensated by (1) billing the ISP a surcharge for the interstate use of its network; (2) billing the CLEC for access compensation; or (3) billing the ISP subscriber for access compensation. SBC's proposal is a complete non-starter. First, the LEC serving the ISP subscriber may not have a service relationship with the ISP, thereby making a payment obligation from the ISP to the LEC serving the ISP subscriber difficult to enforce. Second, SBC should be extremely careful about what it asks for. Although SBC begins its proposal by distinguishing between "the LEC serving the ISP" and "the LEC serving the ISP's subscriber," SBC Comments at 22, it proposes that only the CLEC be charged for access. If SBC's proposal were to be considered seriously, the LEC serving the ISP would have to be charged for access, which could very easily be the ILEC when the CLEC's customer base expands. SBC's proposal raises the interesting situation of an ILEC being billed access charges by a CLEC. Because access charges are higher than reciprocal compensation rates, the amount of money owed by ILECs to CLECs could significantly outpace the reciprocal compensation payments ILECs presently owe. No doubt that, if adopted, when CLECs take advantage of this SBC position and submit bills for access charges to SBC, SBC will deny ever proposing it.

Third, SBC proposes imposing access charges on its own customers for Internet access. This proposal is a variation on the proposal to impose access charges on ISPs that has already been rejected by the Commission.[2] Whether access charges are imposed on ISPs or ISP subscribers, neither proposal is sound public policy and would be contrary to the Commission's clearly articulated position on the issue.

Another option proposed by SBC is that the current "subsidy" to ISPs could be recovered from the federal Universal Service Fund. Although imaginative, it has no logical or legal foundation. First, the Commission would have to determine whether there is any subsidy provided to ISPs. If there were a subsidy, the subsidy could come only from reciprocal compensation rates set above cost. The solution to that problem would be to reduce all reciprocal compensation rates to cost rather than continue the inefficiencies of any implicit subsidies. Second, universal service is subject to its own intricate statutory requirements and rules that have proven to be difficult to administer. The Commission should not complicate the implementation of universal service rules with SBC's baseless proposal.

US West proposes that payment should come from the ISP to cover the costs of the LEC serving the ISP, and the same revenue-sharing arrangements used for Feature Group A should be

[2]Declaratory Ruling at para. 34.

used for ISP-bound traffic. US West Comments at 4. The Virgin Islands Telephone Company's proposal is similar. VITELCO Comments at 13-14. Under that arrangement, the two carriers that complete the local call to a FGA platform agree to share the costs of the service and the revenues obtained from the IXC for the service. Under US West's proposal, the specifics of the revenue-sharing arrangements should be subject to negotiation by the parties, and the FCC should permit such negotiation to occur at the industry level. For Bell Atlantic and Cincinnati Bell, the default rule should be that carriers simply retain the payments they receive from their own customers. Bell Atlantic Comments at 6; Cincinnati Bell Comments at 4-5.

The US West revenue sharing proposal erroneously presumes that there are revenues from ISPs to be shared by local exchange carriers. Bell Atlantic recognizes that there are no access revenues to share, but believes that LECs should each suffer the consequences of the ESP exemption. Bell Atlantic Comments at 6. GTE proposes that the Commission should impose an 18-month moratorium on inter-carrier compensation in which the CLECs collect their costs from ISPs for the services they provide. GTE Comments at 19. The Wisconsin State Telecommunications Association proposes a moratorium of at least two years for implementation of inter-carrier compensation rules. Wisconsin State Telecommunications Association Comments at 2.

Under each of the compensation systems proposed by US West, Bell Atlantic, GTE, and the Wisconsin State Telecommunications Association, neither the LEC serving the ISP nor the LEC serving the ISP subscriber is directly compensated by the other carrier, and each is responsible for recovering its own costs for handling traffic to ISPs. The concept is not new: it is nothing more than bill-and-keep, but for ISP-bound traffic only. The problem with this proposal is two-fold. First, applying bill-and-keep only to traffic that is demonstrably out of balance is intrinsically irrational and contrary to the intent of the Telecommunications Act. In such situations, the basic construct of bill-and-keep – a balance of traffic leaving both carriers covered by the mutual exchange of traffic – is absent. Second, the ILECs rejected bill-and-keep when it was proposed before.[3] Now that bill-and-keep – but for ISP-bound traffic only – appears to be in their interests, they have seized upon it as the proper method of compensating CLECs. Since the ILECs rejected bill-and-keep, the CLECs have adjusted their business plans. To permit the ILECs to reverse course and apply bill-and-keep to one segment of traffic would confound the reasonable expectations of CLECs and would be tremendously unfair. This heads-I-win, tails-you-lose approach to issues would only encourage future anticompetitive behavior by ILECs.

BellSouth and Ameritech take this revenue sharing proposal one step further by requiring the LEC serving the ISP share the subscriber line charge and local business line rates received from the ISP with the LEC serving the ISP subscriber. BellSouth Comments at 8-9; Ameritech Comments at 13. BellSouth and Ameritech contend that ISPs pay access charges in the form of subscriber line charges and local business line rates. Under this revenue sharing proposal, however, not only must CLECs find, from someplace other than the ILEC, the means to recover the costs that CLECs incur to transport and terminate traffic originated by ILEC customers, but the means available to the CLECs is reduced by a payment to the ILEC of a portion of an ISP's subscriber line charge. As a consequence, the ILEC is compensated not only by the subscriber line charge of its end user originating the call to the ISP, but also by a portion of the subscriber line charge of its competitor's

[3]In opposing bill-and-keep, the ILECs argued that it would constitute an unlawful taking of their property without just compensation. If that were the case, it would be no less a taking when the property taken belongs to the CLECs.

customer. The unfairness to CLECs is obvious, and the Commission should reject this overreaching proposal from BellSouth and Ameritech.

To its credit, Frontier acknowledges that some compensation should be paid to the carrier serving the ISP. Frontier proposes that the FCC should establish a federal compensation regime that contains a benchmark terminating compensation rate at a fraction of the local switching rate, and that requires bill-and-keep when the overall origination/termination ratio is severely out of balance. Frontier Comments at 11. This proposal appears to suggest that the costs of serving ISPs are significantly different from the costs of serving other end users, thereby justifying a much lower rate of compensation. While the proposal recognizes that CLECs incur costs that must be compensated by ILECs, it misses the point. The network functions used to serve ISPs are no different from the network functions used to serve other local exchange customers, so there should not be disparate treatment for compensation for traffic to ISPs.

Frontier also suggests a bill-and-keep arrangement when the exchange of traffic between the ILEC and the CLEC becomes severely imbalanced. Frontier Comments at 11. As noted above, this proposal is logically deficient. Bill-and-keep makes sense when the traffic exchanged is roughly in balance. Because the payment of compensation would balance out if the exchange of traffic were equivalent, bill-and-keep avoids the administrative costs of measurement, billing, and collection of termination compensation. If traffic is out of balance, as is the general case now when CLECs are entering the market and in some cases terminate traffic to ISPs, bill-and-keep would represent an enormous transfer of wealth from the CLEC providing a service to the ILEC. The ILEC is obtaining for free services from the CLEC it would otherwise have to provide itself. In addition, no ILEC appears to be in favor of bill-and-keep for cellular traffic, even though the flow of that traffic is generally imbalanced also. If Frontier's intent is to provide incentives to CLECs to serve customers that originate more traffic than they terminate, surely there are better options available. Frontier's proposal would have the effect of requiring CLECs to match a customer with high volumes of terminating traffic with a customer with high volumes of originating traffic in order to avoid the sanction of no compensation when traffic volumes are out of balance. The likely result of requiring this constant pairing of customers (e.g., CLEC A will only serve an ISP if it can also sign up a telemarketer as a customer) would be for CLECs simply to avoid those customers with high origination or high termination volumes, leaving those to the incumbent carrier. Such a proposal has the potential to be highly discriminatory to such high volume telecommunications users, and would stifle local competition by narrowing the customer base available to CLECs.

In sum, none of the inter-carrier compensation systems proposed by the ILECs withstands scrutiny. Because they fail to compensate the LEC serving the ISP adequately, they should be rejected.

B. The Compensation Systems Proposed by the State Commissions Raise Issues Worth Considering

State commissions also filed comments proposing alternative inter-carrier compensation systems. The Texas Commission states that it has considered one of the options presented by the Commission in the NPRM: a two-element compensation structure in which originating carriers pay a fixed charge for every call to reflect the fixed costs of call set-up, and a low per-minute compensation rate to reflect the usage sensitive termination costs. Texas Public Utility Commission Comments at 7; NPRM at para. 29. If the Commission considers adopting this proposal, it should extend the identical treatment to all local exchange traffic. If the intent of adopting such a rule is to more accurately capture the costs of transporting and terminating traffic, the same situation extends to any call to any other local exchange customer. Because the network functions are the same whether the call is to one's neighbor or to one's ISP, the compensation structure should be the same.

The Texas, Florida, and Indiana Commissions also proposed that the FCC should consider encouraging the states to require bill and keep. Texas Public Utility Commission Comments at 7; Florida Public Service Commission Comments at 10-11; Indiana Utility Regulatory Commission Comments at 9. As argued above, a bill-and-keep compensation system was proposed by CLECs long before traffic was exchanged between ILECs and CLECs. Again, bill-and-keep was not considered appropriate for cellular traffic that is also imbalanced. To require bill-and-keep now would frustrate the business plans of CLECs designed after they lost the issue of reciprocal compensation before state arbitrators. Permitting bill-and-keep now would send a signal to ILECs that state commissions will bail them out of their faulty business decisions and will permit ILECs to confound CLEC business plans. Such an arrangement would be tremendously unfair to CLECs and would stifle the development of local competition.

C. The Proposals Submitted by CLECs Provide the Fairest Treatment to Carriers Serving ISPs

In the end, the most reasonable proposals are those submitted by the CLECs. Because the network functions required to provide service to ISPs are no different than the network functions required to provide service to any other end user, the compensation for ISP-bound traffic should be the same as the compensation for all other local exchange traffic. If compensation rates for ISP-bound traffic should be lowered, the rates for the transport and termination of all local exchange traffic should be lowered.

II. STATE COMMISSIONS HAVE CONTINUED TO RULE THAT RECIPROCAL COMPENSATION OBLIGATIONS APPLY TO ISP-BOUND TRAFFIC

Since the Commission issued its Declaratory Ruling that state commissions have the authority to determine whether the reciprocal compensation provisions in interconnection agreements apply to ISP-bound traffic, a number of state commissions have ruled on the issue. Two decisions have involved Pac-West's interconnection with incumbent carriers. In California, a Final Arbitrator's Report was issued this week in an arbitration proceeding between Pac-West and Pacific Bell. The Arbitrator's Report held that Pacific Bell was required to pay reciprocal compensation to Pac-West for the transport and termination of traffic to ISPs. A copy of the Report is attached as Exhibit A. In Nevada, the Public Service Commission adopted a modified arbitration decision that required the payment of reciprocal compensation for ISP-bound traffic. The Nevada Commission effectively reversed the hearing officer's decision holding that Nevada Bell was not required to make these payments to Pac-West. A copy of the Nevada decision is attached as Exhibit B. The California and Nevada decisions make clear that state commissions remain convinced that reciprocal compensation is owed for ISP-bound traffic following the Commission's Declaratory Ruling. Reciprocal compensation for ISP-bound traffic remains sound public policy and does not discourage the development of local competition.

III. CONCLUSION

The alternative compensation proposals submitted by the incumbent local exchange carriers should be rejected because they do not provide for adequate compensation to the local exchange carrier that transports and terminates traffic to ISPs originated by customers of another local exchange carrier. The only proposals that fairly compensate LECs that serve ISPs are the proposals submitted by the CLECs, and possibly one proposal submitted by the Texas Public Utility Commission. As the regulatory commissions of California and Nevada continue to recognize since the Declaratory Ruling, reciprocal compensation is an appropriate form of inter-carrier compensation for ISP-bound traffic.

Respectfully submitted,

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Dated: April 27, 1999

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